Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 2007

TOM H. WHITESIDE,
Petitioner
v.
CARR, HUNT & JOY, L.L.P., DONALD M. HUNT, LATRELLE BRIGHT JOY AND GARY BELLAIR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE SEVENTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Texas Court of Appeals' overly restrictive analysis of Plaintiffs well recognized common law breach of contract claim and refusal to order documents submitted *in camera* violate the Due Process Clause of the U.S. Constitution?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Tom H. Whiteside, hereinafter Whiteside, was the plaintiff in the District Court, appellant in the Seventh Court of Appeals and petitioner in the Texas Supreme Court.

Carr Hunt & Joy, L.L.P., Donald M. Hunt, Latrelle Bright Joy and Gary Bellair, hereinafter CHJ, were the defendants in the District Court, appellees in the Court of Appeals for the Seventh District and respondents in the Texas Supreme Court.

ABBREVIATIONS

Parties	*Abbreviations*
Gary Bellair	Bellair
Carr Hunt & Joy, L.L.P.	CHJ
Donald M. Hunt	Hunt
Latrelle Bright Joy	Joy
Mullin Hoard & Brown, L.L.P.	MHB
Joe H. Nagy, Sr.	Nagy
Tom H. Whiteside	Whiteside

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ON PETITION FOR WRIT OF CERTIORARI TO
THE TEXAS COURT OF APPEALS
FOR THE SEVENTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

Tom H. Whiteside ("Petitioner" or "Whiteside") respectfully requests that this Court reverse the judgment of the Texas Court of Appeals for the Seventh District of Texas and

remand the case to the Court of Appeals for the Seventh District of Texas with instructions to conduct the appeal of an arbitration award in accordance with accepted standards of Due Process.

OPINIONS BELOW

On October 25, 2005 the Arbitrator, Joe H. Nagy, Sr., made his decision in favor of CHJ (Pet. App. 1).[1] The 99th District Court Trial Court denied Whiteside's Motion to Reconsider on February 2, 2006 (Pet. App. 4). The Trial Court's judgment upholding the arbitration award was signed on February 13, 2006 by the Honorable Judge William C. Sowder of the 99th District Court (Pet. App. 5). The opinion of the Court of

[1]The Appendix filed by Petitioner Tom H. Whiteside with its petition for writ of certiorari is referred to herein as "Pet. App."

Appeals in the Seventh District for the Petition for the Writ of Mandamus is reported at *In re Whiteside*, No. 07-06-0078-CV, 2006 WL 1519430 (Tex. App. – Amarillo June 6, 2006, orig. proceeding) (Pet. App. 6). The June 27, 2006 opinion of the Court of Appeals in the Seventh District in response to Whiteside's Motion for Rehearing of Petition for Writ of Mandamus is reported at No. 07-06-0078-CV 2006 LEXIS 5839 (Tex. App. – Amarillo June 26, 2006, orig. proceeding) (Pet. App. 7). The January 23, 2007 opinion in the Court of Appeals for the Seventh District on Whiteside's appeal is reported at *Whiteside v. Carr Hunt & Joy*, No. 07-06-0207-CV, 2007 WL 172028 (Tex. App. – Amarillo Jan 23, 2007) (Pet. App. 8).

The Texas Supreme Court refusal to grant Whiteside's Petition for Writ of Mandamus (Pet.

App. 9) on February 17, 2007 and denial of Motion for Rehearing (Pet. App. 10) on February 27, 2007 are both unpublished. The Texas Supreme Court denial of Whiteside's Petition for Review on June 1, 2007 (Pet. App. 11) and Whiteside's Motion for Rehearing of Petition for Review on July 27, 2007 (Pet. App. 12) are unpublished.

JURISDICTION

On February 13, 2006 the Trial Court affirmed the arbitration review and refused to order documents produced *in camera* (Pet. App. 5). On June 2, 2006 the Appeals Court for the Seventh District denied Whiteside's Petition for Writ of Mandamus (Pet. App. 6) and Motion for Rehearing on June 27, 2006 (Pet. App. 7). On January 23, 2007 the Court of Appeals for the Seventh District affirmed the Trial Court's

decision in a Memorandum Opinion (Pet. App. 8). On February 17, 2007 the Texas Supreme Court denied Whiteside's Motion to Stay Proceedings and Petition for Writ of Mandamus (Pet. App. 9). In Whiteside's Motion for Rehearing to the Texas Supreme Court filed on June 18, 2007 the issue of Due Process was raised (Pet. App. 30). On June 8, 2006 Whiteside filed his Motion for Rehearing in the Court of Appeals for the Seventh District raising the issue of Due Process (Pet. App. 25). On February 27, 2007 the Court of Appeals for the Seventh District denied Whiteside's Motion for Rehearing (Pet. App. 10). In Whiteside's Petition for Review to the Texas Supreme Court (Pet. App. 30) filed March 13, 2007 and Motion for Rehearing (Pet. App. 31) filed on June 18, 2007 the issue of Due Process was raised. The Texas Supreme Court denied Whiteside's Petition for Review on

June 1, 2007 (Pet. App. 11). The Texas Supreme Court denied Whiteside's Motion for Rehearing of the Petition for Review on July 27, 2007 (Pet. App. 12). This Court has jurisdiction under 28 U.S.C. §1254(1)(a).

RELEVANT STATUTORY PROVISIONS INVOLVED

Relevant portions of:

1. TEX. BUS. ORG. CODE

   § 152.002 (Vernon 2004-2005) (Pet. App. 13)

   § 152.601 (Vernon 2004-2005) (Pet. App. 13)

2. TEX. CIV. PRAC. REM. CODE

   § 171.050 (Pet. App. 13)

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§ 171.088(a)(3)(A) (Pet. App. 13)

§ 171.088(a)(3)(C) (Pet. App. 13)

3. TEXAS CONSTITUTION art. I § 13 (Pet. App. 13)

4. TEXAS GOVERNMENT CODE ANN.

§ 22.001a(3) (Pet. App. 13)

§ 22.221 (Pet. App. 13)

5. FEDERAL CONSTITUTION

U.S. CONSTIT. AMENDMENT V (Pet. App. 13)

U.S. CONSTIT. AMENDMENT XIV § 1 (Pet. App. 13)

6.. FEDERAL STATUTE, 28 U.S.C. § 1257(a) (Pet. App. 13).

STATEMENT OF THE CASE

A. Factual Background

On March 1, 1995 Whiteside signed a partnership agreement contract with CHJ (Pet. App. 14). Prior to October 31, 2000 CHJ began negotiations, without the knowledge of Whiteside, with Mullin Hoard & Brown, L.L.P. (hereinafter MHB) (Pet. App. 15). On request from CHJ, Whiteside tendered his resignation on October 31, 2000 (Pet. App. 15). On November 1, 2000 Hunt and Joy joined MHB as partners and Bellair as an employee (Pet. App. 16). On October 6, 2004 Whiteside filed suit on the partnership agreement for failure to pay amounts owed under Paragraph 18 (Pet . App. 14). On January 20, 2005 (Pet. App. 24, Ex. F) and March 14, 2005 (Pet. App. 23, Ex. A) Whiteside requested documents from CHJ regarding its dealings with MHB in 2000. (Pet.

App. 23, and Pet. App. 24). CHJ refused to provide the requested documents on January 21, 2005 (Pet. App. 24, Ex. F), March 2005 (Pet. App. 23, Ex. C) and March 22, 2005 (Pet. App. 23, Ex. B). Arbitration was held on September 27, 2005 with Joe H. Nagy, Sr. (hereinafter Nagy) as arbitrator under an agreement drafted and signed that day which provided pertinently: 1) "After November 1, 2000, Tom Whiteside was not paid pursuant to the said Paragraph, but was paid his participation percentage of the account receivables actually collected less his proportionate part of the expenses;" 2) "The parties agree that no evidence other than the contract will be considered at this hearing and the arbitrator will render a decision as a matter of law" (Pet. App. 16). The oral stipulations were as to the partnership agreement

signed on March 1, 1995 and that on November 1, 2000 Hunt, Joy and Bellair joined MHB.

On September 28, 2005 Whiteside submitted his Arbitration Brief and Letter Supplement to Arbitration Brief (Pet. App. 17) stating pertinently "breach of contract, has been admitted by CHJ ... With no evidence offered by CHJ, there is no excuse or defense ..." and "While CHJ would like the Court to consider this defense, it vehemently refuses to disclose the documents which reflect the dealings with Mullin Hoard & Brown, L.L.P."

CHJ submitted their Brief on October 5, 2005 stating pertinently: "[D]issolution occurred pursuant to Paragraph 22a at the end of the day on 31 October 2000 ... [T]hat was both a dissolution by majority vote and by operation of law."

Gary Bellair also filed his Post Submission Position Statement on October 5, 2005 stating

pertinently "On 31 October 2000, Whiteside withdrew and Hunt, Joy and Bellair ceased to practice law as members of the Carr-Hunt-Joy Partnership."

On October 25, 2005 Nagy issued his opinion finding no breach stating "[I]t was stipulated at the Arbitration hearing on September 27, 2005 that Tom Whiteside, Donald M. Hunt, Latrelle Bright Joy and Gary Bellair had terminated their relationship with Carr, Hunt & Joy, L.L.P. as of October 31, 2000. ... No other evidence or testimony was taken at the hearing" (Pet. App. 1).

Whiteside replied to Nagy on October 28, 2005 (Pet. App. 18) stating pertinently:

> There is no evidence that 1) Hunt, Joy and Bellair ceased practicing law as members of CHJ on 31 October 2000; 2)

dissolution occurred at the end of the day on 31 October 2000. (Not content with 1 November 2000 as the start of business with MHB, CHJ and Bellair move back their "dissolution by majority vote" to 31 October 2000 to support their theories of contemporaneous withdrawal with no deemed redemption of Whiteside's interest and no "remaining" partners to collect and pay Whiteside under Paragraph 18); 3) on 31 October 2000 there was a dissolution by majority vote and operation of law; 4) CHJ began the process of winding up on 1 November 2000.

On November 4, 2005 CHJ responded pertinently stating "...while no formal meeting

was held or a vote taken, Hunt, Joy and Bellair voted with their feet ..." (Pet. App. 19).

On November 18, 2005 Nagy denied Whiteside's Motion to Modify or Correct the Award. (Pet. App. 2).

On November 21, 2005 Whiteside wrote to Nagy (Pet. App. 20) arguing "[I]t is your duty as an arbitrator under the Texas Arbitration Act to "hear all the evidence material to the controversy." §171.088(a)(3)(C).

On December 1, 2005 Nagy denied Whiteside's claim. (Pet. App. 3).

On December 2, 2005 Whiteside wrote Nagy (Pet. App. 21) stating pertinently: "[W]ithout further factual evidence you cannot decide either occurred and your only decision could be there was a breach. You can only determine there was a dissolution, and therefore no breach, by examining

CHJ's records of dealings with Mullin Hoard & Brown."

On February 2, 2006 the Trial Court denied Whiteside's Motion to Reconsider. (Pet. App. 4).

HOW THE ISSUES WERE DECIDED BELOW

The Trial Court signed a Judgment on February 13, 2006 (Pet. App. 5) in favor of CHJ which denied Whiteside's Motion to Submit Documents *In Camera* (Pet. App. 23) and Whiteside's Motion to Vacate (Pet. App. 22).

On June 2, 2006 the Court of Appeals for the Seventh District in a per curiam Memorandum Opinion by Quinn, C.J., Campbell, J. and Francis, J., Seventh Court of Appeals, sitting by assignment, denied Whiteside's Petition

for Writ of Mandamus (Pet. App. 6) stating pertinently:

> Without expressing an opinion on the merits of either contention, we are unpersuaded the absence of the requested documents inhibited the presentation of those arguments to the trial court or in an appeal. Both the record of the evidence considered by the arbitrator and his refusal to consider evidence of dealings between the other CHJ partners and MHB can be established without the documents relator seeks. *See Walker*, 827 S.W.2d at 843-44 (appeal remedy may be inadequate when discovery denied and reviewing court is unable to evaluate effect of error on the record before it).

> Relator has failed to show the documents are necessary to his presentation of either of the asserted grounds for vacation of the arbitration award.

On June 27, 2006 the Court of Appeals for the Seventh District denied Whiteside's Motion for Rehearing of Mandamus (Pet. App. 7) stated pertinently:

> The supplemental motion alleged the CHJ partnership obtained the arbitration award by misrepresenting to the arbitrator whether there was a dissolution of CHJ or merger with the MHB partnership. The Motion did not challenge the validity of the September 27, 2005 agreement and

stipulation limiting the evidence the arbitrator could consider.

The January 23, 2007 Memorandum Opinion for the Court of the Appeals for the Seventh District of Texas (Pet. App. 8) stated pertinently:

> [2]As we later discuss, Whiteside contends the circumstances raise the issue whether this action constitutes a merger of the partnerships or acts of the former partners individually. The record indicates Whiteside's former partners occupied the same offices and used the same office staff and equipment as they used in the CHJ partnership.
>
> ...

[3]Both parties also cite Texas and federal court cases, applying the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16. State and federal jurisprudence in this area is largely consistent and the well-developed federal jurisprudence is instructive. *See In re D. Wilson Const. Co.,* 196 S.W.3d 774, 780 (Tex. 2006) (state and federal acts can apply simultaneously).

...

An appellate court's review of the trial court's confirmation of the arbitration award is de novo. *Werline v. E. Tex. Salt Water Disposal Co.,* No. 06-06-0039-CV, 2006 WL 3715907 (Tex. App. –

Texarkana December 18, 2006, no pet.) (applying Texas common law).

...

In view of the parties' express agreement limiting the evidence to be considered by the arbitrator, the trial court did not err in declining to vacate the arbitrator's award on the grounds he exceeded his powers or refused to hear material evidence by giving effect to the agreement.

...

Assuming, without deciding, that the test for fraud set out in *Karaha Bodas* is applicable under the TGAA,[5] the record here does not establish the elements of that test. Like *Karaha Bodas,* the conduct

Whiteside challenges was known before the arbitration hearing, precluding him from satisfying the second element. Far from pursuing his outstanding requests at the arbitration hearing, Whiteside entered into the submission agreement, including its express provision limiting the evidence to be considered. The agreement negates his assertion that appellees "wrongly" withheld the records. *See Karaha Bodas,* 364 F.3d at 304 (noting representation at conclusion of arbitration hearing that record had been 'fully made").

Whiteside's contention the arbitrator had no evidence on which to decide

whether the partners' actions constituted a dissolution or a merger with MHB without examination of CHJ's records of "dealings" with MHB is, at bottom, an attack of the sufficiency of the evidence on which the arbitrator based his decision.

...

Whiteside's second issue assigns error to the trial court's failure to order production of documents concerning dealings between CHJ and MHB for *in camera* review.

...

Here, the trial court had before it the unchallenged submission agreement limiting the evidence to be considered by the arbitrator. We

hold the trial court did not err in declining Whiteside's motion to compel production of documents for *in camera* review and overrule his second issue.

REASONS TO GRANT THE WRIT

1. Due Process denial of access.

a. Applicable Law

The June 20, 2002 opinion of this Court in *Christopher v. Harbury,* 536 U.S. 408 (2002) states pertinently:

...

> The second category covers claims not in aid of a class of suits yet to be litigated, but of specific cases that cannot be tried (or tried with all material evidence), no matter what

official action may be in the future.[9] The official acts claimed to have denied access may allegedly have caused the loss or inadequate settlement of a meritorious case, *e.g.*, *Foster v. Lake Jackson,* 28 F.3d 425, 429 (CA5 1994); *Bell v. Milwaukee,* 746 F.2d 1205, 1261 (CA7 1984) ("[T]he cover-up and resistance of the investigating police officers rendered how [the plaintiff's] right to seek redress"), the loss of an opportunity to sue, *e.g., Swekel v. River Rouge,* 119 F.3d 1259, 1261 (CA6 1997) (police cover-up extended throughout "time to file suit ... under ... statute of limitations"), or the loss of an opportunity to seek some particular

> order of relief, as Harbury alleges here. These cases do not look forward to a class of future litigation, but backward to a time when specific litigation ended poorly,[10] or could not have commenced, or could have produced a remedy subsequently unobtainable.[11] The ultimate object of these sorts of access claims, then, is not the judgment in a further lawsuit, but simply the judgment in the access claim itself, in providing relief obtainable in no other suit in the future.
>
> ...

The Supreme Court further explains:

> Decisions of this Court have grounded the right of access to courts

in the Article IV Privileges and Immunities Clause, *Chambers v. Baltimore & Ohio R. Co.,* 207 U.S. 142, 148 (1907); *Blake v. McClung,* 172 U.S. 239, 249 (1898); *Slaughter-House Cases,* 16 Wall, 36, 79 (1873), the First Amendment Petition Clause, *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 741 (1983); *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 513 (1972), the Fifth Amendment Due Process Clause, *Murry v. Giarratano,* 492 U.S. 1, 11, n. 6 (1989) (plurality opinion); *Walters v. National Assn. of Radiation Survivors,* 473 U.S. 305, 335 (1985); and the Fourteenth Amendment Equal Protection,

Pennsylvania v. Finley, 481 U.S. 551, 557 (1987), and Due Process Clauses, *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974); *Boddie v. Connecticut*, 401 U.S. 371, 380-381 (1971).

Finally this Court explains that:

> It may be case that an underlying action has already been tried to an inadequate result due to missing or fabricated evidence in an official cover-up, see, *e.g.*, *Foster*, 28 F.3d, at 427; *Bell*, 746 F.2d, at 1223, or the claim may still be timely and subject to trial, but for a different remedy than the one sought under the access claim, or against different defendants.

The Court of Appeals for the Fifth Circuit in *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989) stated pertinently:

> Although judicial recognition of the constitutional right of access to the courts occurred long ago,[FN7] the current contours of the right can best be described as nebulous. If for no other reason, this is because much of the development of the right has occurred in the prison context, where state officials have the capability of exercising both direct and indirect control over the litigation activities of incarcerated individuals.
>
> ...
>
> FN7. The origins of the right can be traced to *Chambers v.*

Baltimore & Ohio R.R., 207 U.S. 142, 148, 28 S.Ct. 34, 35, 52 L.Ed. 143 (1907):

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship ...
>
> Although this discussion of the right took place in the context of the privileges and immunities clause of article IV, section 2 of the Constitution, the right has also been said to

> derive from the due process clauses of the fifth and fourteenth amendments and the right of petition found in the first amendment. *See generally Ryland v. Shapiro,* 708 F.2d 967, 971-72 (5th Cir. 1983) (citing cases).
>
> ...
>
> As we have pointed out, however, our cases also stand for the proposition that mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be 'adequate, effective, and meaningful.' *Ryland v. Shapiro,* 708 F.2d at 972 (quoting *Bounds v. Smith,*

430 U.S. 817, 822, 97 S.Ct. 1491, 1495, 52 L.Ed.2d 72 (1977)). Id. at 811.

...

In the world of litigation outside prison walls, these cases are of little assistance. Unlike prisoners, ordinary individuals do not find any physical barriers between them and the courts. To file a complaint or legal paper, they need merely travel to the courthouse or even just the nearest mailbox; to obtain legal advise, they need only travel to a lawyer's office or the nearest library, or pick up the telephone. If the constitutional right of access has any sweep outside the prison context, therefore, it must be based upon a more nuanced

interpretation of the requirement that such access be "adequate, effective, and meaningful."

...

> FN8. The Ryland court also surmised without citation to authority, that "any interference with a substantive constitutional right, such as the right of access to the courts, may by itself amount to a constitutional deprivation (unless reasonably justified by a countervailing state interest)." 708 F2d at 975. Id. at 811-812.

...

FN9. Other courts considering official cover-ups similarly have held that a showing of substantial prejudice to the plaintiff's rights is required. *See Bell v. City of Milwaukee*, 746 F.2d 1205, 1260-61 (7th Cir. 1984).

...

Germany v. Vance, 673 F.Supp. 1143, 1149 (D.Mass. 1987) (state officials who failed to inform then-incarcerated minor that key witness had recanted testimony may be sued for violating her right of access to the courts, insofar as "failure to disclose facts which are

essential to a incarcerated individual's claim for relief may be more effective in denying access to the courts than destroying court papers or limiting access to the mail") (footnote omitted, *aff'd in part, rev'd in part*, 868 F.2d 9 (1st Cir. 1989). *Cf. Howland v. Kilquist*, 833 F.2d 639, 642 (7th Cir. 1987) (in the context of *pro se* prisoner litigation, stating that "some showing of detriment caused by the challenged conduct must be made in order to succeed on a claim alleging a deprivation of the right to meaningful access

to the courts" (citations omitted)). Id. at 813.

...

The right of access to the courts is what may be described as a facilitative right. It is designed to ensure that a citizen has the opportunity to exercise his or her legal rights to present a cognizable claim to the appropriate court and, if that claim is meritorious, to have the court make a determination to that effect and order the appropriate relief.

...

Id. at 814.

b. Application to Arbitration.

No federal cases have been found which applied the "right of access" or Due Process to

state courts of appeal's proceedings in arbitration. A Texas court has applied the Texas Constitution's "Open Courts"[2] provision to arbitration, but determined the same was not violated. *Blumberg v. Berg*, No. 2-04-138-CV 2005 WL 1047592 (Tex. App. – Fort Worth 2006, no pet.). Often Texas state and federal courts have applied Due Process to arbitration. *See In re Noteboom*, 111 S.W.3d 794 (Tex. App. – Fort Worth, 2003); *Karaha Bodas Company,*

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[2]In *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex. 1990) explained the "Open Courts" provision as follows:

In order to establish an "open courts" violation, a litigant must satisfy a two-part test: first, he must show that he has a well-recognized common-law cause of action that is being restricted; and second, he must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.

L.L.C. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004), cert. denied, 543 U.S. 917 (2004); *Trans Chemical Ltd. v. China Nat Machinery Import and Export Corp.*, 161 F.3d 314 (C.A.5 Tex., 1998); *Brozo v. Shearson Lehman Hutton, Inc.*, 865 S.W.2d 509 (Tex. App. – Corpus Christi, 1993); *Harbison-Fischer Mfg. Co., Inc., v Mohawk Data Sciences Corp.*, 823 S.W.2d 679 (Tex. App. – Fort Worth, 1991); *Robison v. Wichita Falls & North Texas Community Action Corp.*, 507 F.2d 245 (C.A.5 Tex., 1975).

The Fifth Circuit in *Karaha Bodas* considered Due Process claims in arbitration under New York Convention, but found no violation. Significantly, the Court considered that "refusal to grant continuance and additional discovery did not 'so effect the rights of

[Pertambangan] that it may be said that [it] was deprived of a fair hearing.'" Id. at 302. This is, of course, the case on which the Court of Appeals relied in holding that given the submission agreement Whiteside could not complain since he had represented, like Pertambangan, that the record was "fully made". See opinion page 20, *supra.*

c. The Vanishing Trial

Several commentators have acknowledged the decline in trials and have postulated that arbitration may play a significant role. See Patricia Lee Refo, *Opening Statement The Vanishing Trial,* THE JOURNAL OF THE SECTION OF LITIGATION AMERICAN BAR ASSOCIATION, Volume 30, No. 2, Winter 2004; Chief Justice Wallace B. Jefferson, *The State of the Judiciary in Texas, Presented to the 80th Legislature February 20,*

2007, TEXAS BAR JOURNAL, April 2007; Justice Nathan L. Hect, *Jury Trials Trending Down in Texas Civil Cases*, TEXAS BAR JOURNAL, October 2006. Since arbitration decisions are unpublished, the question remains if Due Process rights are being protected. In labor arbitration the "Due Process Protocol" has been employed to ensure "effective discovery ... the key to true justice in arbitration cases." See *The Arbitration Setting and the Tension Between Due Process, Expedited Proceedings, "Winning," and Ongoing Cooperative Relationships*, Section of Labor & Employment Law, ADR in Labor & Employment Law Committee, 1999 Mid-Winter Meeting, AMERICAN BAR ASSOCIATION, February 6-10, 1999, page 9. A necessity exists for this Court to examine the extent of Due Process protection in arbitration.

2. The Court of the Appeals denial of Due Process.

The Court of Appeals' overly restrictive review of Whiteside's arbitrated breach of contract claim under TRCP § 171.086 (Pet. App. 13) and § 171.088 (Pet. App. 13) and refusal to order documents submitted *in camera* are unreasonable or arbitrary when balanced against the purposes of arbitration. While arbitration is viewed as a valid, expeditious alternative to litigation, an overly restrictive effect on common law contract claims cannot stand. Here, the Court's method of analysis, despite its *de novo* review, upholds an award unsupported by evidence and permits no review of admittedly withheld evidence which could also potentially reveal the claims to be fraudulent and not in good faith. Further, the Court ignores the plain language of the

submission agreement in finding no breach and ignores the second arbitration phase which allows for evidence of CHJ's lack of good faith.

Finally, the Court makes a curious and unfounded finding that Whiteside knew of CHJ's claimed dissolution before arbitration. The laudable goals of speedy and economical resolution of disputes do not overcome the right of the participants to have "remedy by due course of law." Due course of law is not achieved when an award is affirmed when contrary to the contract and secured by unsubstantiated, unreviewed representations.

The award must be vacated for Nagy's refusal to consider evidence material to the controversy which denied Whiteside a fair hearing. CPRC § 171.088(a)(3)(C) (Pet. App. 13) and § 171.088(a)(3)(A). (Pet. App. 13). Nagy's

ruling of no breach adopted CHJ's undisclosed theory of simultaneous dissolution with Whiteside's withdrawal. However, without considering CHJ's evidence of dealings with MHB prior to November 1, 2000, the arbitrator could not determine as a matter of law whether there was either a merger or dissolution. As noted above, the finding of dissolution is unfounded. To exclude the only evidence which would support or defeat the finding of dissolution necessarily deprives Whiteside of a fair hearing.

In its' opinion on Whiteside's Motion for Rehearing of the Petition for Writ of Mandamus, the Court of Appeals for the Seventh District (Pet. App. 7) questioned why Whiteside's motion did not challenge the validity of the September 27, 2005 submission agreement (Pet. App. 16) limiting the evidence the arbitrator could

consider. In fact the arbitrator is not limited to what the parties agree or what information he is given. See CPRC § 171.050 (Pet. App. 13). (Depositions); § 171.051. (Subpoenas) (Pet. App. 13). If the arbitrator felt he had insufficient information to render a decision, then he "was empowered to cause the discovery necessary to the resolution of the issues before (him)". See *Mewbourne Oil Co. v. Blackburn*, 793 S.W.2d 735, 737 (Tex. App. - Amarillo 1990, orig. proceeding). Here, however, he adopted CHJ's theory without any supporting evidence, ignored the overwhelming evidence which disproved the theory and refused to order the production of any documents which would support the same explaining (wrongly) that he was limited to the parties' agreement. Thus, the arbitrator deprived Whiteside of a fair hearing in not ordering

evidence produced which would have conclusively determined the issues before him.

The Court of Appeals wrongly held that "the conduct Whiteside challenged was clearly known by Whiteside before the arbitration hearing" and the submission agreement negated Whiteside's "assertion that the Appellees wrongly withheld the MHB records" thus overruling his claim of undue means. While Whiteside did agree to submit the issue of breach of contract on limited facts, Whiteside did not agree to CHJ's potentially fraudulent assertion of dissolution. Contrary to the Court of Appeals' contention as stated above, Whiteside was unaware that CHJ and Bellair were contending a "dissolution" occurred until after the cause was submitted; CHJ's and Bellair's confidential position statements were not provided to Whiteside before

arbitration. The confidential parties' statements were provided by Nagy to the Court of Appeals in a sealed envelope. (See CR: Sealed Records). The dissolution arguments were actually only disclosed to Whiteside after submission in their October 5, 2005 Brief and Post Submission Statement.

As soon as Whiteside was aware of CHJ's and Bellair's contention of dissolution, he urged Nagy "during the arbitration" to secure and examine the MHB records. (See Pet. App. 17). He then sought the Trial Court, the Court of Appeals and the Texas Supreme Court to order the same submitted *in camera* without success. However, Whiteside only presumes the documents support his contentions of undue means and lack of good faith. This is not, as the Court of Appeals holds, simply an attack on the "sufficiency of the

evidence," but whether CHJ and Bellair wrongly withheld their dealings and misrepresented whether dissolution occurred to wrongfully influence the arbitrator and procure the award by undue means. The fact that CHJ's lack of good faith and potential misrepresentations were successful is not a defense to the Court's ordering an examination of the documents by the Trial Court.

Moreover, CHJ's and Bellair's arguments in their briefs before the Court of Appeals support Whiteside's request. CHJ argued the case should be affirmed since "Whiteside, however, never proved that any party ever withheld any document. ... Whiteside only speculates about evidence, speculates about his entitlement and speculates how the evidence might help him." (See CHJ's Brief to the Court of Appeals (pages 19-20).

Further, Bellair's Brief to the Court of Appeals (pages 1, 4, 11-13) argued the case should be affirmed because " ...Whiteside failed to prove all the elements of fraud necessary to justify the rendition of an order vacating the arbitration award."

Thus, CHJ and Bellair argue a lack of evidence of undue means while lowering "an iron curtain of silence" over the very evidence which would decide the issue. The MHB records must be examined to determine whether CHJ's and Bellair's representations of dissolution to the arbitrator (who accepted the statement as fact), the Trial Court and the Court of Appeals is true.

By stating "the Court had before it the unchallenged submission agreement limiting the evidence to be considered by the arbitrator," the Court of Appeals attempts to relieve itself of

any analysis of the lower Court's decision. Whiteside had not agreed to exclude evidence of CHJ's dealings with MHB in the arbitration as the submission agreement provided for a damages phase and a determination of "any remaining claim."[3] Unlike the losing party in *Karaha Bodas, supra,* Whiteside showed the CHJ records he sought from the arbitrator, District Court, Court of Appeals and Texas Supreme Court would have created fact issues material to determining whether he received a "fundamentally fair hearing." Id. 364 F.3d at 305. An award rendered without a review of the

[3]If the arbitrator should decide that the ... partners are liable to Whiteside ... then the partners on each side agree to submit a calculation of the amount, if any, owed ..." and "then the arbitrator will determine any remaining claims, if any." (Pet. App. 16).

undisclosed documents is fundamentally unfair.

Moreover, the proper abuse of discretion standard here is whether an inspection of the documents was necessary. Where, as here, CHJ contended that the documents were not discoverable given their lack of relevance and privacy[4], it is an abuse of discretion to rule without first examining the documents. See *State v. Lowery,* 802 S.W.2d 659, 774 (Tex. 1971). The documents themselves are the only evidence that supports the claim of privilege and therefore must be examined. See *Axelson v. McIlheny,* 798 S.W.2d 550, 553 (Tex. 1990). Moreover, the Court

[4]If you want to see them I will be happy to produce them, but they are not relevant to this because they are about my individual law practice and joining another firm. (See RR at 30).

"cannot evaluate the effect of the Trial Court's error" without ordering the Trial Court to make the documents part of the record. See *Walker v. Packer,* 827 S.W.2d 833, 843 (Tex. 1992). Moreover, the Court of Appeals abused its authority in not exercising its mandamus power under TEX. GOV. CODE ANN. § 22.221 (Pet. App. 13) to protect its own jurisdiction on a pending appeal when "the conduct complained of ... interferes with our ability to resolve a matter pending before us."[5] Here, the documents implicate a pending appeal and their absence interferes with the Court of Appeals' ability to resolve the vacatur issues before it.

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[5]See *re Moody,* 93 S.W.3d 928 (Tex. App. – Amarillo 2003) (orig. proceeding).

CONCLUSION

The Court should grant certiorari and schedule this case for briefing and oral argument.

Respectfully submitted,

Tom H. Whiteside

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